

## MICHIGAN SUPREME COURT

June 15, 2000 Public Hearing

**JUSTICE WEAVER:** Good morning. We're here on our administrative agenda and I do need to say that Justice Kelly is not able to be with us today. She will have access to the tape of the hearing. We're going to start with Item number one and I would let everyone know again how we go along so that we give everybody an opportunity to speak. You will have three minutes to address the topic and the Justices will not ask you questions as a rule during that period. And then any questions they have they'll ask you and that will be it. We will then begin with Item No. 1 - 96-59 which deals with permanent disbarment issue. And I have here Mr. Thomas W. Cranmer from the State Bar has asked to speak. Would you come forward please. And always identify yourself. At one minute you'll have a yellow light and when the red light comes you're finished.

### Item 1 - 96-59 - Permanent Disbarment

**MR. CRANMER:** Your Honor, good morning, and good morning to the other Justices as well. My name is Tom Cranmer and I'm appearing this morning on behalf of the State Bar of Michigan as a member of the Board of Commissioners of the State Bar. And very quickly I want to apologize for Mr. Butzbaugh not being here. He's actually in Washington and had planned to be here but unfortunately the weather was such that he was not able to be with us because his flight was canceled. I want to speak to the proposed amendments to MCR 7.300 and 9.100 dealing with potential permanent disbarment for attorneys. And I guess as I look at this rule a couple of things come to mind. It strikes me that in terms of any proposed changes to any of the court rules one has to ask themselves is there a need for a change and has there been a problem with the rule as it has existed. And I would respectfully suggest to the Court that at least from the State Bar's perspective the answer to that question is no. The information that I have is that over the past 10 years or so approximately 249 lawyers have been disbarred. Of that number only 6 have been readmitted to practice before the State Bar of Michigan. I believe the evidence would suggest that 90 or 95% of those disbarred never even seek reinstatement. And again it strikes me that we first need to ask ourselves is there something that needs fixing and I would respectfully suggest to the Court that there is not. I think if we take a look at the states that have permanent disbarment there is a relatively small number of states including Alabama, California, Florida, Indiana, Ohio and looking at the empirical evidence that I've been able to uncover from those states does not suggest to me that permanent disbarment has created any greater deterrent as far as protection of

the public is concerned, nor has there been any suggestion that it has enhanced the public's confidence or perception in the disciplinary system. And I would respectfully submit and suggest to the Court that if in fact we go to a system of permanent disbarment or recission as the proposed rule talks about, what we will actually see is a dramatic decrease in the number of disbarments. The reason I suggest that is because I myself sit as a chairperson of a hearing panel and have done so for the past 10 years or so. The proposed rule as I understand it indicates that the amount of potential suspension can be increased from I think the maximum now of five years up to apparently an indefinite period of time. I believe that most hearing panels would be loathe to impose the death penalty sanction of disbarment when they would have a longer period of suspension to deal with. And I believe what would happen then is that ultimately the number of total disbarments would go down, which I think could potentially be a public relations disaster for both the court and the bar as well. Because I think it would not be the type of story that would be reported in the newspaper as being a positive reflection on the disciplinary system. I see that my time is about up and I would happy to try to address any questions that the Court might have.

**JUSTICE CAVANAGH:** The way you couched it, that permanent disbarment now is five years is somewhat inaccurate to the extent that presumably it's permanent but the application can be made after five years.

**MR. CRANMER:** Yes.

**JUSTICE CAVANAGH:** In your view, are there some offenses that are so egregious and inimical to our system of justice, let's say bribery of an elected official, for example, commission of a violent felony, that are so egregious that ought to warrant a truly permanent expulsion from the profession for the benefit of the profession.

**MR. CRANMER:** And the protection of the public, I think, Your Honor, and I think the answer from my own personal perspective to that question is yes, but I think that the system that we now have allows for that, does accomplish that, and I would just hate to see us put ourselves in a position where we essentially are for a certain category of lawyers saying there could never, ever be a circumstance where you could somehow be rehabilitated. It may be only one lawyer in 500 who meets the standard but if we do impose this permanent disbarment concept I think we're closing certain doors or opportunities that I'm not sure that we need to or ought to be doing.

**JUSTICE WEAVER:** Any other questions. Thank you Mr. Cranmer. Mr. William Luther. Let me interject at a moment and let everyone know that because we have put these matters on the agenda does not mean that the Supreme Court has taken a position on them, that we either favor or disfavor them. We believe these issues have

come to our attention for various reasons and that we need public comment on them as to whether there should or should not be action.

**MR. LUTHER:** Thank you for your comment. Thank you Court. William Thornton Luther. I totally disagree with the gentleman prior to me due to the fact that I have personally experienced from an attorney, actually several, well, let's get into it. What is truth. Truth is a conclusion based upon facts. And since matters of litigation require individuals receiving the facts from a witness, the trier of fact will never have information better than second hand. That is the foundation for a court's opinion. That being the case, it is very, very imperative that attorneys do not lie in court. Jennifer Granholm says lawyers whose strategies cause discomfort and delays are not living up to their calling. Our system is based on truth telling and fairness. The calling is from the spirit of truth. The spirit of fairness. I have here orders of discipline and disability. It's a Chuck Rummager, P26899. He was suspended for, I don't know, 3 months, just recently. I have here August 24, 1994 is when I hired Chuck Rummager. I have here billings from Chuck Rummager in May 31, 1994, June 3, 1994, June 15, 1994, July 25, 1994, July, August, August. He's billed me before I even hired him. I have here enclosed please find executed copies of the proposed order regarding discovery in the captioned matter. I assume and will rely that it is your agreement in this regard to protect and preserve the confidentiality of the information disclosed. That was to a prosecutor. Motion for prosecutorial discovery. This was in March of '95 by the prosecutors who stated I could not have committed a crime that I am now on probation for for the rest of my life. It is withheld from the court and withheld from me by Chuck Rummager. I do believe Chuck Rummager was disbarred a long time before February of this year. I think when he had long hair and I was told he was on drugs and alcohol. So he's had two suspensions. So should this person still continue to practice law in Michigan? Frank Stanley took \$60,000 after the fact and did he lie to the court? I think not. He told the Attorney Grievance Commission that under the issues of law and the issues of fact there was nothing he could do for me. So with a proven, documented 3/7/95 prosecutorial discovery, which I was in another place, Frank Stanley couldn't do anything for me. So he either lied to the court or there is nothing to do.

**JUSTICE WEAVER:** Mr. Luther, your time has expired. Any questions? Thank you very much for coming. Mr. Jerry Bush.

**MR. BUSH:** Hello. There are three of us who are pro se litigants from West Michigan, the injustice capitol of the whole world. Mr. Wabake (sp) is in the back, the gray-haired gentleman, had 15 years of pro se representation of himself and mostly on public issues met many lying attorneys along the way. I myself have had 10 years and have met many lying attorneys along the way. Those who, any attorney who lies to the

court is attempting to gain by unjust advantage an advantage. And justice cannot be done in such a circumstance. And as the man from the Bar said, he questions whether they should be disbarred or not and I'm not here to tell you they should absolutely be in every case of wrongdoing but I think unquestionably there should be instances where attorneys should be permanently disbarred for some conduct. The question is what conduct. And there are some conduct that is truly bad nature. One Mr. Luther just brought to your attention. Malicious prosecutions. Any prosecutor who is willing to take somebody to trial, throw him in jail, ruin the rest of their life for unjust reasons or even shaky reasons, in my opinion should be disbarred. Or at least disbarred from being a prosecutor for the rest of his term. I see my little yellow light is on, but I would like to pose to you something that Judge Thomas Penchal (?) Jackson reported in the June 8, 2000 Wall Street Journal in the Microsoft case. He said *falas in uno, falas in omnibus*, untrue in one thing, untrue in all. Could a similar statement be true of attorneys, lie in one thing, lie in all. How about lie in one court, lie in all courts. Then maybe it could be said that unethical in one court, unethical in all. I have a lot of stuff I'd like to tell you but I guess my time is running out. I could tell you about 10 years of one attorney going against me, lying in every court that he's ever been in, including the U.S. Supreme Court. Trying to get the Clerk of the U.S. Supreme Court to dismiss a case based upon emotion and a request for an extension of time. Now that attorney has lied, as I said, in the U.S. Supreme Court, and he has lied to this Court. He's lied to the Court of Appeals and he's lied to every inferior court or agency that's come down below that. Plus he's done a lot of other things. Conflict of interest and things I'm sure you'd love to hear about. But I guess my time is up.

**JUSTICE WEAVER:** Thank you very much. Any questions? We appreciate your coming. We will proceed now. We have two people who have asked to speak on all the issues and one is Barb Willing. Is she here. Do you wish to speak on this issue? Barb Willing? Not present. Anita Amato. Is she present? Okay. Is there anyone else here to speak on Item 1 concerning permanent disbarment? Okay. We'll now move to Item 2 which is 97-56 and that is whether to adopt the proposed revision of rules and the rule regarding the use of communication equipment in garnishment after judgment. I have no one listed here to speak on that. Is anyone here to speak on that. Okay, we'll move on to Item 3 which is 98-46 concerning MCR 9.130. This is whether to amend this rule to include a cross-reference to MCR 3.602, court rule governing statutory arbitration. Again I have no one here to speak on that item. Is anyone here to speak on that item. Some of these items are just matters that we published and have not attracted any comments but we want to give opportunity for them. Number 4. 98-50, family division rules. This issue is a comprehensive revision of the rules which will affect family court practices needed. And let us see if we have comment here. I have Alex Sagady.

#### Item 4 - 98-50 Family Division Rules

**MR. SAGADY:** I'm Alex Sagady. I'm a board member of Capital Area Fathers for Equal Rights in Lansing. I'm here to speak on Rule 3.215 and 8.110. Michigan's one court of justice and its Friend of the Court offices is the governmental institution more responsible than any other in the state of Michigan for the pandemic destruction of the institution of fatherhood and father-child relationships in the state. One reason for this is the ongoing disallowance of the full measure of due process and equal protections that should be afforded to father custody litigants in the state. Adoption of these two rules continues, unfortunately, this practice. Rule 3.215 provides for de novo hearings following a referee's report. Unfortunately it undermines current case law in Stringer v Vincent which requires full evidentiary hearings. This rule as it's written does not require a full evidentiary hearing, does not guarantee the right of cross-examination, does not guarantee the right to bring other witnesses to court. There is no band on ex parte communication between the trial court and friend of the court personnel. Another existing practice which this rule overturns is the requirement that a friend of the court report or memorandum not be considered evidence in a proceeding if both parties do not agree. This rule overturns that implicitly by saying the judge shall review the record of the hearing before the referee and any memoranda, recommendations or proposed orders. That effectively puts friend of the court reports that would have been otherwise disallowed because of disagreement between the parties into the record. This rule does not require findings of fact and conclusions of law in all cases including post-judgment motions concerning parenting time and other matters that come before the court post-judgment. Finally, giving judicial powers to friend of the court clerks as Rule 8.110 would allow invites tremendous abuse. There was a hearing where 3,000 people complained about the operation of the friend of the court to a Senate investigation panel. There is massive invidious discrimination against men and their efforts to maintain father-child relationships in friend of the court offices. This rule would allow entry of ex parte orders by clerks that would take thousands of dollars and months to overturn because your current rules on ex parte orders do not truncate effectiveness of those orders at the time of a filing of an objection. They continue in effect until a full trial court considers them. Having clerks be able to enter that kind of order is very, very destructive and harmful. Thank you.

**JUSTICE CAVANAGH:** Do you recall under the old rules, I seem to vaguely recall something, that the filing of objections to, I think back then they called them interim orders where the complaint was filed and there would automatically be an interim order of support signed with the filing of a complaint and the requirements then for obtaining such an order were pretty loose, that led to a lot of revisions. In other words, the ex parte order almost automatically would enter setting some form of support but it

was my understanding that once objections were filed, and I think they had to be filed within 10 or 15 days, I don't recall, that that automatically suspended the effect of that interim order pending a hearing before the court.

**MR. SAGADY:** No that's not correct. These orders which are entered by—

**JUSTICE CAVANAGH:** I'm talking about the way it used to be.

**MR. SAGADY:** Well, I guess I could speak to the way it is experienced for our members and that is that these orders are entered not only on support, they're entered on parenting time and custody and they continue with indefinite effectiveness even after the filing of an objection and it can be many months before all the issues created for father custody litigants by such orders can be resolved or even addressed by a trial court and that's really unfair. That kind of system tells fathers up front that we don't care about your relationship with your child enough to hear you before we enter orders with massive effect on you that will take potentially tens of thousands of dollars to overturn. That is the dynamic by which Michigan courts tell fathers they have no chance to win or tell poor fathers who have no money that they will not be parents to their children because they cannot raise money for attorneys or they don't know how to represent themselves in order to overturn these things. That is a socially destructive policy, it's very damaging.

**JUSTICE TAYLOR:** Do you feel all friend of the court offices are systemically biased against men?

**MR. SAGADY:** Well, many of them are. There actually are some statistics.

**JUSTICE TAYLOR:** Well if so, why is that.

**MR. SAGADY:** There is some feeling that father-child relationships on the part of some of these offices are not important. There is a feeling, for example, that joint custody should not be allowed. There is data that shows, for example, that Muskegon is the best place to litigate for a father seeking joint physical custody because on the order of 60+% of divorce judgments entered in that county embody joint physical custody. Most of the other major counties for urban areas, for example, for the state, are at 15% or lower. Some, for example, Macomb County, is as low as 6% joint physical custody. That kind of data shows that there is a systemic problem with bias in the operation of the friend of the court.

**JUSTICE YOUNG:** Mr. Sagady, have you submitted written comments regarding your concerns with these rules.

**MR. SAGADY:** Unfortunately I just learned about this hearing just the other day. I will submit written comments if someone can tell me if they would be considered say in the next 7 days.

**JUSTICE WEAVER:** Yeah, you can submit your written comments.

**MR. SAGADY:** Thank you very much, I really appreciate that.

**JUSTICE CORRIGAN:** I would reiterate to you, sir, that just because rules are out there does not mean that the Court is committed to them and with regard to the question of delegation to clerks of the judicial authority that this Court has repeatedly resisted efforts to delegate authority to clerks that belong to judges in the past. I'm not speaking for the Court but I want you to understand that I share your concern about that problem.

**MR. SAGADY:** 8.110 would do that.

**JUSTICE WEAVER:** And you are objecting to the de novo hearing.

**MR. SAGADY:** Yes, it just does not afford adequate due process protection and it's already undermining some decisions of the Court in the case of Stringer v Vincent.

**JUSTICE WEAVER:** Okay, you can check with our clerk's office about submitting your written comments.

**JUSTICE CAVANAGH:** The Family Rules Division Committee that reviewed these proposals submitted them to us. One of the rules that they urged the Court to move faster on than some of the others was 8.110. So I would suggest when you submit your comments that you be as specific as you can as to what changes you would make to 8.110 to make it workable or very specific as to what is unacceptable in the proposal. Probably to each, but I'm just saying 8.110 was flagged for our attention by the Rules Committee.

**MR. SAGADY:** Okay, I will do that. Thank you very much, I appreciate this opportunity to address the Court.

**JUSTICE WEAVER:** Thank you very much for coming. Mark Sherbow.

**MR. SHERBOW:** Good morning, Your Honors. My name is Mark Sherbow and I'm representing the Referees Association of Michigan. I will not speak to the proposed 8.110. We take no position on that. I am speaking to 2315(F)(4) and (5) and I would like to tell the Court that I believe it is a very good addition to the rule for several reasons. One it will enable the court that is doing a de novo hearing to more thoroughly assess all of the evidence that was submitted in the initial hearing and the rational for the referee's recommendations. Secondly, it will assist in eliminating two trials, effectively. If I have an evidentiary hearing and I issue a recommendation and there is a transcript that is provided to the court, it will eliminate the necessity for bringing the same witnesses, retrying the same issues, having what may be a day hearing in front of me which would take possibly two days in front of a judge because of the other pressing duties. It would be substantial attorneys fees, time off work for the litigants. The record would refresh the attorneys' and litigants' memories at the time of the de novo hearing. May provide a better basis for settlement in the interim and will just keep everyone honest not in terms that I would believe they wouldn't tell the truth but that will certainly enable them to remember more correctly what had occurred. I think that it further defines what a de novo hearing is and assists the judge and I disagree with the prior speaker. I believe that de novo hearings are de novo hearings. This would enable some testimony, however, not to be retaken if it is available to the court. And lastly I think it gives a meaningful review of a referee's performance and it reinforces that that branch that has been created is not there just spinning its wheels and having hearings which once heard can be completely disregarded but are of some use to the court system and to the litigants hopefully. And the only addition I would like to make is that I think there maybe should be more immediate implementation of a recommended order by a referee. There are court rules, most particularly MCR 2.614 which prohibit enforcement within 21 days but if we are allowed to enter our recommended orders that's the same time allowed for objection for review and that way the prevailing party would not have to wait until the end of whatever long litigation. I thank you very much for your time. I'm open for questions if anyone has any.

**JUSTICE YOUNG:** Can I ask you a question. Is the current practice that the referee's findings and conclusions can be precluded from being passed on to the trial judge.

**MR. SHERBOW:** The state of the law is, Your Honor, that they can be reviewed by the trial court but they cannot be considered in the rendering of a decision.

**JUSTICE YOUNG:** Pardon me. I can read it but I can't do anything with it.

**MR. SHERBOW:** Honestly, I can't believe that any judge who reads it

doesn't consider it to some extent. Absolutely.

**JUSTICE YOUNG:** But it is not required that both parties stipulate.

**MR. SHERBOW:** To have them reviewed, that's correct. To have them accepted as evidence it is required that both parties stipulate.

**JUSTICE YOUNG:** I'm sorry. I'm just talking about the conclusions and findings. That's evidence?

**MR. SHERBOW:** Well if both parties stipulate that the judge can rely on that as part of his or her decision, then it is required to stipulate. But without the stipulation the judge still has the right to review although I think the case law says it cannot consider in making his or her decision.

**JUSTICE TAYLOR:** Is there usually, by the time the referee makes a recommendation, a friend of the court report on the case worker's idea on how this should go.

**MR. SHERBOW:** Sometimes. Sometimes I have my family counselor issue a full report and then I take testimony and there are times where it's just a regular evidentiary hearing in front of me without any prior groundwork. Without bringing psychological testimony or—

**JUSTICE TAYLOR:** Does the court get the use of the friend of the court report in that circumstance.

**MR. SHERBOW:** The court would, in all probability, review my recommendation even if they started a de novo hearing, yes.

**JUSTICE TAYLOR:** Well in the current universe I'm asking about, if there is an appeal up from the referee's finding, would the parties be able to present the friend of the court report to the court or it is again that situation where it's not evidence but it can be looked at.

**MR. SHERBOW:** The parties wouldn't. Every time I issue a recommendation it goes out to the parties, a copy goes to the court. In fact the letter is addressed to the Hon. Edward Sosnick, who I work for and with a cc to the parties or their counsel and it's sent to them, and a copy is put on file at the judge's office. So if there are objections that come in and they ask for a de novo hearing, I guess it's all put

together and he will look at that most often prior to the time or during the time he has the de novo hearing.

**JUSTICE TAYLOR:** Well isn't the theory of the friend of the court that these are supposed to be additional hands for the judge so that reliable people can go out and talk to the teacher and talk to the neighbors and talk to others who have something to contribute about the custody situation. Is that the theory of the friend of the court? I know there's the function of collecting the money and so on and I don't want to worry about that right now, but just in terms of these great decisions about where the child should be and so on.

**MR. SHERBOW:** Okay, I guess that is true. We are really an investigative arm in that sense. However, the referees are a little more than that. We are almost all attorneys in the state now. We all have, or almost all of us have substantial background in domestic relations, often much more so than the judge. And I guess we're used for direction and assistance with—we also have more time for more hands on. We don't have—

**JUSTICE TAYLOR:** But in theory what are you supposed to be doing. Aren't you supposed to be assisting the judge.

**MR. SHERBOW:** In theory yes. I'm relieving the court of as much of the work as possible to allow the court to proceed with those matters that are so time consuming.

**JUSTICE TAYLOR:** Does it happen in this state that if the judge is consistently unhappy with the product of the referee or the case workers that they get rid of them?

**MR. SHERBOW:** My experience has been yes. My experience is those judges who are unhappy with friend of the court referees either remove them or ignore them. And in recent years it has been much more the former. Historically it was the latter.

**JUSTICE WEAVER:** Now you're assigned to the one judge.

**MR. SHERBOW:** In my county. In Wayne County, for example, they have nine referees who are assigned, what would have been 37 judges, a couple of their caseloads. Now I think there are 7 judges now so the 9 referees cover for the 7 judges. In Macomb County I think that they are more interchangeable but each referee is responsible to a certain judge. And I think in most counties it works that way.

**JUSTICE WEAVER:** Now what would you perceive when you were talking about describing to Justice Taylor the present procedure. How do you perceive these rules changing the present procedure.

**MR. SHERBOW:** The proposed rules I think, personally I think and as a member of the organization, will improve the ability of justice. We are going to submit a transcript. It will avoid the necessity of trying a case from scratch a second time. If I've got an actual transcript from a friend of the court hearing and I send that to my judge, then there may be 5, 6, 7 witnesses that aren't necessary whose testimony is there. I've been practicing for 30 years. Most of the referees in my building have been practicing 15, 20 years. We are fairly well-qualified. I believe we're good at, granted we're not an established court and courts are supposed to determine veracity and take a look at the witnesses but we do that. And that is one of our responsibilities. We do all of the pro per and most of the de novo requests, by the way, are pro pers. They're not between attorneys because attorneys who choose to have evidentiary hearing cases before us usually either accept our recommendation or settle once we've issued it. And it would prevent a retrying of those issues, spending more days in court.

**JUSTICE TAYLOR:** If the position of the previous speaker were adopted, how many more circuit judges would you need.

**MR. SHERBOW:** Well having been on the trial court case load study, Oakland County would need at least two more.

**JUSTICE TAYLOR:** Just because of this, I mean.

**MR. SHERBOW:** I believe at least that because of this. I have 18 in pro per custody and child support modification hearings each week. I have 50 child support enforcement hearings per week and then I assist the judge with his motion call and then I have evidentiary hearings on top of that. And if a judge were to have to directly hear all of those initially on top of all the trial work they do—

**JUSTICE TAYLOR:** Did this referee system originate as you understand it because of the need for assistance for the judge.

**MR. SHERBOW:** Initially. When it first started, I believe it was the early or mid-'70s, I practiced in Wayne County and we were overburdened. Fridays were the motion day down there and the domestic docket was overwhelming. It completely overwhelmed the general civil docket. In those days I was on bar committees really arguing against the referee system and we argued vociferously against it. But I have found

as a practitioner—I just became a referee a few years ago. I practiced law for 25 years. I found that when you had knowledgeable referees they were able to work out our problems. They had more time to concentrate on, instead of just rulings, mediate or work with us in trying to solve the problem for the parties as opposed to just render decision and send us to the courtroom and take up the judge's time. I found them an excellent source of benefit to my clients over the years and I still believe that.

**JUSTICE YOUNG:** Do I understand you to say that creation of transcripts of the referee hearings is going to expedite the process.

**MR. SHERBOW:** I believe so.

**JUSTICE YOUNG:** What is your understanding of the transcription rate in your court.

**MR. SHERBOW:** Very little transcription rate. But if you're going to have a de novo hearing, most people now don't request a transcript from my hearings when they ask for a de novo hearing.

**JUSTICE TAYLOR:** Are they videotaped?

**MR. SHERBOW:** No we are on Sony recording machines in our office.

**JUSTICE WEAVER:** So are you automatically transcribed from the machine or does it have to be typed up or what.

**MR. SHERBOW:** It has to be typed up. Well, actually I can give my tape to the judge. It can be at no cost to the litigant. We have a special tape that cannot be altered. They're specially coded. And when the parties request a transcript then I give them a tape which they take to a transcriber. If they want a de novo hearing without ordering a transcript I ask them if they would like me to send the tape to the judge so he can hear it. Sometimes they say yes, sometimes they say no.

**JUSTICE CORRIGAN:** Isn't there expense to the parties associated with procuring the transcription.

**MR. SHERBOW:** There would be except that if I submit the tape to the judge to hear then there is none.

**JUSTICE CORRIGAN:** But how do the parties get access to that. How do

they listen.

**MR. SHERBOW:** If he wanted to play it during a hearing he could. If they wanted it separate, they would have to, it's \$13.00 for the tape and then they would have to have it transcribed.

**JUSTICE CORRIGAN:** At the going rate for transcription. But isn't the brunt of these folks in pro per having a financial problem in the first place because they don't have a lawyer in front of you, so we're inflicting costs on them for the transcripts.

**MR. SHERBOW:** True, I can't argue with that. I don't necessarily know the solution to that but I do know that if they try the case a second time or a third time that the cost may not be any less to them. If I have a pro se litigant in front of me who tries a case against a party with an attorney and they spend a day in front of me and then they spend 2 days or 3 days in front of my judge and if they want any kind of transcript it's still going to cost them and if they don't that means they're going to start the trial from scratch, and if they lost and they're asking for de novo and they lose the second time, I don't know that my judge isn't going to say you know, you've caused us to go through a second hearing when there was no basis—

**JUSTICE CORRIGAN:** It's a systemic cost, but what about cost for the litigants. Work that out for me. You say it costs more, how's that. Explain that.

**MR. SHERBOW:** Well, I guess time off work. And the systemic cost is the most, but time off work, and the possibility, especially if we've got a party who is asking for de novo hearing because they lost is losing again and causing costs to be incurred by the other party who may be represented by counsel, there could be attorneys fees involved. It may not be as expensive as a transcript but then again most pro se litigant hearings are not really a day, they're an hour, an hour, an hour and a half in front of me, which might be longer in front of a judge due to other matters that a judge has to attend to that I don't.

**JUSTICE WEAVER:** Why would it be longer in front of the judge. You mean the judge will not be able to turn his attention to it.

**MR. SHERBOW:** Well I can set my docket. I know on Tuesday mornings I have five pro se cases. One at 8:30, one at 9:30, one at 10:30, and so I know I have. But when they go to a judge's for a hearing at 8:30 he or she has pretrials and they have emergency motions and they have other matters on their dockets.

**JUSTICE WEAVER:** So the hearing is not really longer, it's just that it may take longer to get it accomplished. That's what you're saying.

**MR. SHERBOW:** Correct, yes.

**JUSTICE CORRIGAN:** Can I ask one more question about de novo. Is the hearing de novo or is the result de novo.

**MR. SHERBOW:** The hearing is de novo.

**JUSTICE CORRIGAN:** Don't we need another word for it because it's not truly de novo if we say you can do it on transcripts, is it. De novo contemplates starting from scratch and having the hearing. It's de novo in the sense that the court isn't bound in the slightest by your result.

**MR. SHERBOW:** I'm sorry, I thought you meant currently but yes, you're right, it would be not exactly de novo if they're using the transcript.

**JUSTICE CORRIGAN:** So we really shouldn't call it that.

**MR. SHERBOW:** I agree.

**JUSTICE TAYLOR:** Has your organization inquired as to what it would cost to get the proceedings that you have videotaped. I mean I think one of the complaints that the loser has in front of the referee is that a circuit judge or family court judge, however it may be, might not have a sense of the tenor of the hearing. The credibility factors that don't come through on a typed transcript but that that might not be so much the problem were it videotaped. Has anybody ever looked into that.

**MR. SHERBOW:** No. However most counties where we have transcripts we can send the tapes, audiotapes, which may not be as clear a source as the tenor of the hearing but certainly can reflect the tones and the attitudes of everyone from the referee to the clients. But we have not. I know that Oakland County hasn't seen fit to put them in all the courtrooms yet.

**JUSTICE TAYLOR:** Well a lot of that has to do with the power of the court recorders who don't want to have videotape—

**JUSTICE CORRIGAN:** But there are also discussions regarding problems with videotaping and many courts have dropped videotapes in Michigan as a consequence

of issues involving videotape, as I understand it. Even advocates have found issues.

**JUSTICE WEAVER:** You don't have any real time transcribing there, in other words there are machines now that as it's being said it is being typed.

**MR. SHERBOW:** No, we don't have those.

**JUSTICE CAVANAGH:** I always marvel how over the years of time have changed and things have grown. You mention the referees dated to around the '70s. I think they preceded that. I was an investigator at Wayne County Friend of the Court in the mid-'60s and they had I think three referees and the only thing that those referees dealt with primarily were large asset divorces where they delved into the holdings of the parties and made reports and recommendations to the judges. They might occasionally get a specific referral for a particularly nasty custody matter but the volume just didn't seem to be, at least the referrals weren't there. The trial courts did most of it. When I came to Lansing as a practitioner I was again amazed to find that there was one friend of the court, one person for the whole county and they didn't do final reports. And I kind of found that mind boggling. I said well the statute says the divorce can't be final until a final report is done but the circuit judges said basically well we only do them if we think we need them. From that, here we are in the year 2000.

**JUSTICE WEAVER:** Now you are representing the Referees Association of Michigan only you're from Oakland and in Oakland you have a referee for each family court judge, is that right?

**MR. SHERBOW:** We have 17 referees but we don't only do hearings. We do some investigation and we author our own reports on a variety of things so it isn't like we're full time hearings officers.

**JUSTICE WEAVER:** And you're all funded by the County of Oakland.

**MR. SHERBOW:** Well partially by federal funds and partially by Oakland County, yes.

**JUSTICE WEAVER:** Okay, any other questions?

**MR. SHERBOW:** Thank you very much for the opportunity.

**JUSTICE WEAVER:** Is there anyone else for the family division rules that wanted to comment. Did Barb Willing or Anita Amato arrive.

**MS. ALAMATO:** Good morning to you all and please accept my gratitude for the opportunity and honor of addressing this high court with an impassioned plea for your careful and thoughtful consideration of my deep concerns regarding the operations of the Michigan family courts in general, specifically the Wayne County Family Court. With all due respect and honor deserving to this high court I give you fair notice that my plea is based on strong yet honest words on my information and belief as those which provide the cornerstone of justice in our fine state. My name is Anita Alamato. I have lived in the Township of Northville for over 20 years. I'm a longstanding resident of Michigan. I'm a single, self-employed health care professional and the proud parent of a wonderful and exceptionally bright 9-year-old boy who declined to join me today as it's his last day of third grade. For the past 24 months, sometimes represented by counsel and currently pro se I have gained first-hand observations, experience and knowledge of the outrageous injustices which prevail in the Wayne County Family Court system established just two years ago. I aver to this high court that the Wayne County Family Court is failing to uphold the administration of justice in this county in which it was created to serve, in blatant defiance of the intent of our founding fathers, by the people, for the people, one nation under God. Enough said. Sitting judges in the Wayne County Family Court are infected with blatant ills including but not limited to personal bias and prejudice. Gender bias. Bias against in pro per litigants. Intemperance, infirmity, unscrupulous political influences and other such ills prejudicial to the administration of justice. The helping hand the Wayne County Family Court, i.e., the friend of the court, remains without a statutory citizen advisory committee. The Wayne Commission blames the Legislature, calling this an unfunded mandate. In turn the Legislature blames the Wayne County Commission. The result is the people are left holding the proverbial empty bag. Who are the people to believe when the Commissioners and the Legislators continue to pass the buck under the guise of bureaucratic red tape when any reasonable mind knows that this is a lame excuse at best as both sides continue to shirk their responsibilities towards their constituents, namely the Wayne County families they were elected or appointed to serve. Consequently the voices of Wayne County families pay the price in more ways than one. The families of Wayne County are crying for relief. With all due respect to this high court, do they cry in vain. Can we stand in passivity to a system, namely the Wayne County Family Court, and allow this system which allows and even perpetrates possible fraud, bias, possible extortion and other such ills through biased and incompetent judges as well as the officers of the court, namely the lawyers, who crowd the halls eagerly to line their pockets with the hard-earned money of the unknowing Wayne County families further victimized and violated by ineffective representation, possible collusion with no consumer advocacy law in this state. The families of Wayne County without this protection continue to be held hostage to this ill-fated system. As a result they are suffering serious and irreparable damage due to personal bias, gender bias, bias against in

pro litigants, harassment, humiliation, retaliation, oppression, malice, punitive redress and coercion, abuse of process, court rules, power and discretion, blatant disregard for legislative and constitutional intent, false arrest, of which I have been personally victimized by, extortion, again a possibility, possible fraud, clearly mens rea mindsets, possible RICO violations and such other unthinkable possible corruption and collusion. The Attorney Grievance Commission and the Judicial Tenure Commission are ineffective remedies against the pervasive deep-seated justices named herein. These agencies are too ingrained in such injustices and seeming corruption of the Wayne County Family Court system to offer any semblance of relief to the victimized families of Wayne County. At best they are thinly veiled disguises designed and maintained to provide the unknowing families of Wayne County a false sense of reassurance that remedies are but a grievance form or letter away. This is not true. Due to contagious infection these agencies are clearly incapable of offering just relief and should be immediately replaced with more objective forms for the families of Wayne County. Could it be that we are not all on the same team playing by the same rules promulgated by this state Constitution. Where are our priorities. Who will uphold the priorities of the Wayne County families in the middle of this bureaucratic, pass the buck contest. Has the notion of public service and the integrity of this judicial system been infected with the pervasive sins of society in general, namely greed, power and control. What will become of the families of Wayne County and how will their voices be heard. I respectfully ask this high court to hear my plea. Apparently this system had gotten out of hand of the people it was created serve. The families deserve better. In the name of justice I would like to make a personal request under MCR 8.113 for an immediate investigation into the Wayne County Family Court system. Thank you for your time today. In closing I will remain relentlessly committed to eradicating these ills and I will do whatever I can within my limited means, time and power. Enough is enough. I do not have the knowledge or expertise to comment on rules but if I were to be asked about them I would say we need a rule that all judges and officers of the court begin following the rules. Thank you.

**JUSTICE WEAVER:** Just a minute. Let me ask you, how long have you been involved with the Wayne County, it is actually the family division of the circuit court and you realize it was started a couple of years ago. Were you involved before that time.

**MS. ALAMATO:** My case commenced for the current proceedings in July of 1998.

**JUSTICE WEAVER:** So you were not involved when these matters were over in just the regular circuit court and there was not a family division.

**MS. ALAMATO:** I was involved in front of MaryAnn Botani and she ruled on some consent orders that were entered before her, but there wasn't any protracted litigation at that time. That was back in '95. The current litigation has been going on for two years.

**JUSTICE WEAVER:** So you've been involved for about two years.

**MS. ALAMATO:** About two years this July, yes.

**JUSTICE WEAVER:** Okay. Thank you. Any further questions? I also had a Barb Willing, has she arrived?

**MS. WILLING:** Good morning and thank you. I'm honored to be here today. My name is Barb Willing. I am a host of a radio show by the name of Suburban Whistleblowers, which airs on WPON. I do not have any cases pending. I have never been in a court of law other than as a court observer. I have been a court watcher for over 10 years. I have witnessed the changes in the courts. That being said I would like to thank this public body for accessibility to the citizens of this state for public comment on the proposed changes and amendments of law and court rule. The amendments which seriously need addressing, however, are not contained on your agenda, and although I have a prepared speech, I'm going to read you the part that I have prepared, it's just a really short part on the family courts, since you're on that issue, if you don't mind Justice. I view the family court as a legislative court utilizing volunteer judges from both the probate and circuit courts. Neither you nor I have been able to elect any judges to this court. A right the Michigan Constitution grants me. I assure you I am a disenfranchised voter. The entire family court system acts as a criminal enterprise and should be immediately abolished. I have witnessed custody changes made in three minute motions. Again I am not involved in any custody, divorce or anything. I have seen informal custodial parents never being given hearings for over six months on these temporary changes so that the custodial environment is now established and they are now denied their right. I have seen custodial parents lose any visitation with their children for no grounds whatsoever. In effect what has been created is a false record to the court. This has to stop. There are no court rules in family court. There simply are no court rules. I ask, who's in charge of (inaudible)? The court is run like a corporation. Courts must dispense justice and not act like a Fortune 500 company. Otherwise I would invest and retire as a rich old lady. The price to get into court for the average person is prohibitive. There is no justice. It is a reasonable expectation that the court rules be followed by all. Currently court rules are followed by none. In fact, the introduction of procedural shortcuts contained nowhere in the court rules or in law has increased the risk of error and most importantly, violate due process. Due process is described as a course of legal

proceedings according to those rules and principles which have been established for the enforcement and protection of private rights. No court rules followed, no protection. Shameful state of affairs. Attorneys, officers of the court, who refuse to handle matters solely because there is not enough money in it. Prosecutors who admittedly withhold evidence solely for the purpose of confiscating private property and money. Prosecutors who actually destroy evidence, all for financial gain. Attorneys who are aware—

**JUSTICE WEAVER:** Now is this with the family court.

**MS. WILLING:** Ma'am this permeates all the courts.

**JUSTICE WEAVER:** Okay, but what we're trying to do is have comment on the family court right now. We will give you an opportunity on other issues.

**MS. WILLING:** I'm sorry for interrupting ma'am, but these issues are permeating the family court as much as any court in the land and I'm solely coming before you—

**JUSTICE WEAVER:** Well, are the prosecutors in the family court—on the domestic violence?

**MS. WILLING:** Yes, because the juvenile cases and domestic violence and PPOs and everything else. There's lots of money in PPOs. We've got to stop the money flowing so that we get honesty back in our courts. All I'm asking is, I pray to you today, to all you Honorable Justices, that you immediately invoke your superintending powers and immediately clean up these courts. The ultimate result will be to restore the integrity of a judicial system this state so once enjoyed. I thank you.

**JUSTICE WEAVER:** Can I ask you a couple of questions. You say that you've been involved for 10 years watching the courts. So what I'm trying to get at is has the situation changed over the 10 years, was it better five years ago, and how and you are aware that the judges that have been assigned over to the family court were elected by the people.

**MS. WILLING:** I consider them voluntary—well, a perfect example would be, Your Honor, a probate judge is sitting on the family court. What chief judge do you go to? Do you go to her supervisor, the probate judge, or do you go to her supervisor, the circuit court judge. You see, there are no rules anymore. Nobody knows where to go. And that leaves litigants—

**JUSTICE WEAVER:** That's what you mean by no rules.

**MS. WILLING:** There's no rules.

**JUSTICE WEAVER:** Nobody knows. Because we have court rules but you're saying they're not following them.

**MS. WILLING:** The court rules say shall, you shall personally serve. Nobody is personally served anymore. They dump it in mailboxes, they do what is known as silly(?) service and I sat in court one day and I watched five parents being asked to sign waivers of service because they had not been served. That's unconscionable. They're signing away their rights to their children without even having proper notice. We require due process. That is the most basic tenet of due process. I have personally witnessed this. I invite you. Come with me. I will show you. Because there are some judges where this behavior is allowed and expected. And there are personnel from the county who are required to personally serve. They in turn file false affidavits with the court saying that they in fact personally served when they dumped in a sewer somewhere, and I can prove it.

**JUSTICE WEAVER:** And this is your observations in Wayne County, is that right.

**MS. WILLING:** Wayne County, Macomb County, Livingston County, Saginaw County, Bay County.

**JUSTICE WEAVER:** And you've watched those courts.

**MS. WILLING:** Yes ma'am. Actually because of my radio show I get calls constantly because the court's injustice and you know, basically those are my issues. And I watched it. You asked me a question earlier. Do I think the courts were better 10 years ago, 5 years ago or now. Ten years ago I saw judicial accountability. And somehow we've gotten away from that. And I don't know why we've gotten away from that but we need it back. If a litigant comes before a judge and says Your Honor, I've not been served. That judge owes a duty to say well then we're going to have to adjourn this until we can get you served, or we're going to have to dismiss it because they represented to the court that you were served.

**JUSTICE WEAVER:** And that's not happening.

**MS. WILLING:** No ma'am. And I've got four cases right now where

we've been trying to work with them to try to get that to occur. And not by cases but you know people who have come to me for help. I'm not an attorney but the court rules are not written at a high, you know, we're all practicing law. I don't want anybody practicing law anymore. The law says shall. Shall means shall. It's not may, possibly, no let's dump it in the sewer. It's shall. Maybe if we take the court rules and we turn the may's to shalls maybe we would have some accountability some more. I would like to see that again. Five years ago was when I started to see it mostly change. And I think that's when the family court was being considered. And we started acting like a family court before we became the family court. There really are no rules in family court. Nobody knows which rules to follow. There are some rules for family court which say you have to follow these rules. These rules came in May 1<sup>st</sup> of whatever year and we're going to follow these rules. And then there are other rules that say motion practice here. I know of a case right now where a judge literally called up, after a woman had called and followed the procedures and adjourned it, I have a case right now where the judge called her up, demanded a phone conference within an hour and forced her to come to court the next day after she had already followed the court rules, followed all the procedures and adjourned the hearing. And the judge thought that was unconscionable, then told her that he would be the only one that adjourns motions in her case. I am outraged. I think that's outrageous. This is the kind of thing we're seeing. Not fair play. I'm not asking for anything unreasonable. I'm simply asking for fair play.

**JUSTICE WEAVER:** You would like the rules followed.

**MS. WILLING:** Some rules are made to be broken. It's like a stop sign at 4:00 in the morning in the middle of a bad town. Do you stop. I'm not so certain that I would. If it seems to be a safe area, probably I would. But rules, if we're all playing by the rules then we have a fair game, and all I'm asking for is fairness and reasonableness. I figure that's required.

**JUSTICE WEAVER:** Well we appreciate you coming forward with your comments. Any other questions. Thank you so much. All right, anyone else to comment on these family division rules?

#### Item 5 - 99-14 MCR 2.512 Jury Verdicts

**JUSTICE WEAVER:** We will turn to Item 5 which is the proposed amendment of the jury rules, whether to amend the rule which requires a jury to announce its verdict in a civil case to comport with the court rule which says simply that a jury must return its verdict in open court in a criminal case. Do we have anyone here to comment on this matter. Okay.

Item 6 - 99-18 MCR 8.120 Legal Training Programs

**JUSTICE WEAVER:** Okay, and now turn to Item 6 which is 99-18, whether to amend this rule to add the defender's office. Anyone here for that proposal. I have Julie O'Neill. Come forward please.

**MS. O'NEILL:** Good morning, Justices. My name is Julie O'Neill and I'm here on behalf of Michigan United Conservation Clubs. Michigan United Conservation Clubs, MUCC, is a non-profit 501Z3 organization committed to educate, conserve, develop, protect and manage Michigan's natural resources. We're here today because we're in support of the public, non-profit defender organization in hopes that in some way we can fall under that category. We believe there are significant areas of law that can also benefit by allowing eligible law students to complete certain tasks under Rule 8.120. MUCC's involvement as a public and non-profit defender would provide cost-effective and necessary legal assistance to citizens of Michigan. All of these issues of natural resources and environmental causes are not only issues or facts relating to a certain person, but are issues of statewide significance. Already the state of Michigan enjoys constitutional status. The Michigan Constitution, Art. IV, Section 52 states in part: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety and general welfare of the people." In all, if not most of the litigation that MUCC has been involved in we have not been assessed taxable costs due to the issues of public policy that are before the Court. If 8.120 is amended the hope and goal is that MUCC could expand its work on environmental and conservation issues and most importantly the citizens of Michigan would have a voice for natural resources and environmental concerns. With all that said, even if the Court finds that the public or non-profit defender organizations should be added but for some reason MUCC does not fall under that category or definitions of, we respectfully ask the Court to consider expanding the rule to include environmental and/or conservation organizations. With this expansion MUCC can then given additional legal assistance to Michigan citizens who cannot otherwise afford it. Not only are the natural resources of our state of paramount public concern, but they involve multiple everchanging public policy implications that become more important as time and our environment changes. As it stands now, Michigan citizens trying to protect themselves and their children who cannot afford to fight natural resources and environmental issues have nowhere to go. The proposed addition and/or expansion of the rule furthers the purposes created under Rule 8.120 and congresses inaction of the Legal Services Corporation under 42 U.S.C.A. 2996. In the same way the legal aid clinic provides assistance to people in domestic and/or criminal matters and benefits from the use of eligible law students, MUCC would like to provide the same type of assistance to those

who need it in environmental, conservation and natural resource issues.

**JUSTICE WEAVER:** Any questions? Thank you for coming and commenting. Anyone else on Item 6.

Item 7 - 99-23 MCR 2.119

**JUSTICE WEAVER:** Now turn to item 7. And this item is whether to have a statewide rule that would require an attorney to certify in a request for a hearing on a motion that the attorney has contacted the other side to obtain concurrence in the relief sought and that concurrence has been denied. I have Judge Tim Kenny that indicated he wished to speak on this. Is that correct.

**JUDGE KENNY:** Justice Weaver, I'm here to speak on the last one, on the proposed amendment to Canon 7.

**JUSTICE WEAVER:** Okay. I have been misinformed as to what you want to speak on. Do we have anyone who wishes to speak on Item 7, the one that I just read?

Item 8 - 99-26 MCR 2.107 Fax Filing and Service

**JUSTICE WEAVER:** Okay, we'll pass on to number 8, which is whether to allow the service and filing of pleadings and other papers by fax. Do we have anyone here to comment on that. Nope.

Item 9 - 99-27 MCR 2.310 Requests for Documents

**JUSTICE WEAVER:** Moving on to Item 9. Whether to lengthen from 14 to 28 days the time for a party to respond in writing to requests under MCR.2.310(C)(2), the production of documents and other things or for entry on land. Do we have anyone to speak on that?

Item 10 - 99-59 MCR 7.104 Parole Board Appeals

**JUSTICE WEAVER:** All right, Item 10 is the amendment of Rule 7.104 of the Michigan Court Rules and this is whether to retain the changes regarding appeals from the Michigan Parole Board that were made in light of the recent statutory changes. Anyone on that? Nope.

Item 11 - 99-62 EPIC Rules

**JUSTICE WEAVER:** The next item, 11, whether to amend and finalize interim rules relating to the new Estates Protected Individuals Code. Anyone here to comment on that. Yes.

**MS. CHEEVER:** Thank you Madam Chief Justice. I am Priscilla Cheever, I'm the chair of the Elder Law and Advocacy Section of the State Bar. Many of our members were very active in the Supreme Court's Guardianship Task Force which looked into some reforms that needed to be made that was convened after the Guardian, Inc. problems in Wayne County. We also were active in the EPIC legislation for which these rules will apply. In the Legislature and now in the court rules we seem to be outstripping the opportunity of the Court to implement the recommendations that were made to remedy some problems and we are particularly concerned about three of the rules. We're concerned about 5.310(C)(2) regarding accountings. That is lodged presently in the section regarding supervised administration of decedent estates. It does apply to conservators and guardians of estates for protected persons, however it continues to go in the direction of relying on interested parties to review documents and bring problems to the attention of the probate court. The issue there is that interested parties may not be in a position to do that. We're also concerned about 5.407 regarding the sale of real estate in that it continues the existing rule that the court more or less is a rubber stamp rather than exercising any actual careful look at what is happening. The issue there for us is that the decision to sell real estate is de facto placement decision. Once you sell someone's house and disperse their possessions, they are never going to be able to live there again. We're also very concerned about 8.303, attorney fees which now does not apply to all fiduciaries, but just to personal representatives. The Guardian, Inc. principals, one of the people is serving prison time because of the exorbitant fees that he levied as attorney in all the estates. What we're basically saying is that in a situation where there may not be interested parties because they are either out of state or the person is elderly and the interested parties are as feeble as they, that the court has some special responsibility to protected persons to whom the court has said you are in need of protection to insure that the letters of authority that are issued by the court do not simply become a license to steal because there isn't anyone to come back to the court and say there's a problem here. It seems to us that the court does have to have some responsibility to review the accountings, check real estate agreements and to insure that attorney fee agreements are in writing. In a guardianship case attorney fees may continue for 10, 20 years and that's a lot of money that nobody is particularly looking at.

**JUSTICE CORRIGAN:** Ms. Cheever, just a question for you, ma'am. Are you here this morning representing the State Bar of Michigan.

**MS. CHEEVER:** No.

**JUSTICE CORRIGAN:** Are you representing the Elder Law Section.

**MS. CHEEVER:** Yes.

**JUSTICE YOUNG:** Have you submitted written comments.

**MS. CHEEVER:** We did submit a written comment in the form of a letter last February.

**JUSTICE WEAVER:** You think these rules will help the situation that you've described.

**MS. CHEEVER:** No, I think they will not help.

**JUSTICE WEAVER:** You think they will hurt it.

**MS. CHEEVER:** Yes, because they do not address the problems. The problem here that we have is that we're combining rules that apply to decedent estates with proceedings with guardianship protected individuals.

**JUSTICE CORRIGAN:** Has the Elder Law Section looked at the most recent raft of revisions to the court rules?

**MS. CHEEVER:** 99-63?

**JUSTICE CORRIGAN:** Our Court's file number is 99-62.

**MS. CHEEVER:** Well, yes.

**JUSTICE CORRIGAN:** And as I understand it, when EPIC was adopted then there was a committee that worked, it looks like the Estate and Planning Section and the Probate Rules Committee looked at all of the rules. Have you looked at those rules too?

**MS. CHEEVER:** I have looked at them. They're an improvement over what you're considering today. We still would like some areas strengthened. But those rules, yes, are an improvement but the problem that we have is that these rules are on their way to be adopted and there is always the tendency for busy people in the Legislature and

the Court to say well, didn't we just do this a month or so ago, why are we having to do it again. So we would like to slow down a little bit if there are these proposed rules that have now been published for comment, maybe it would be better to combine them rather than going ahead with this set.

**JUSTICE YOUNG:** These are interim rules.

**MS. CHEEVER:** Yes, they are.

**JUSTICE YOUNG:** My question is, have you commented on the interim rules that we've put into play.

**MS. CHEEVER:** Yes, we did, by letter of February. Thank you.

**JUSTICE WEAVER:** Anyone else for Item 11 on these EPIC rules?

Item 12 - 99-64 - Canon 7

**JUSTICE WEAVER:** Item 12 which deals with Canon 7, whether to prohibit appointment of an attorney by a judge for a two-year period after the attorney made a political contribution to the judge's candidate committee. Judge Timothy Kenny, this is the one you arrived to speak on so we have your name.

**JUDGE KENNY:** Good morning, Justices. Let me first say I appreciate your accommodating me this morning. I did not anticipate that I would be here but we are without electricity in the Frank Murphy Hall of Justice so that our court is closed today.

**JUSTICE WEAVER:** Is that true in a lot of the buildings in Detroit at the moment, or what.

**JUDGE KENNY:** No, I think we're the only court in the city that is not working. Our elevators are not working and they can't transport the prisoners so we're out of commission for today. I am here this morning at the request of our Chief Judge, Judge Sapalla and also on behalf of my 29 other colleagues in the criminal division of the Wayne County Circuit Court Criminal Division. We have in fact submitted a letter from our criminal division colleagues with regards to Canon 7 and let me start out by saying that we are aware of the fact that there has been some concern brought to this Court regarding allegations of misconduct in terms of either the perception or the reality that certain judges are looking to obtain campaign contributions in exchange for assignments. As a preliminary matter I would indicate that we feel very strongly that attorneys should

look to the Rules of Professional Conduct, particularly Section 8.3b which indicates that there is an obligation on the part of members of the bar to bring to the Judicial Tenure Commission issues regarding any substantial violation of a judge's conduct. I think that one of the biggest concerns that we have in our court, and keep in mind if you will that the 30 of us in the Wayne County Circuit Court Criminal Division make up the largest number of circuit court judges in the state with the exception of our entire Wayne County bench. But we are concerned about the fact that we who are responsible for assigning about 12,000-13,000 cases per year would, with this proposed amendment, have our ability to assign the appropriate lawyer to the appropriate case severely hamstrung. And let me give you just a brief illustration. I ran in 1998 and received a number of contributions from defense practitioners who practice in our court. Many of the people who contributed to me who were defense attorneys are experienced attorneys who I knew as a prosecutor when I was a prosecutor, and people who have appeared before me. Now right now we have two very high profile criminal cases in Wayne County. One of them involving a down river case where a gentleman is accused of going into a senior citizen high-rise and shooting and killing several people and wounding several others. That case is in the district court right now with assigned counsel. There is also a case before our court right now involving a sailor who is accused of killing a number of prostitutes. Both very high profile cases. And if I were on assignments right now, if I were given the responsibility of having to assign cases, I would not be able under this proposed amendment to assign who I would think would be the best defense attorneys in these cases because they had attended fundraisers of mine two years ago, not quite two years ago. And I think this is a very serious issue that I would urge this Court to take a look at. One of the things that we have instituted in fact just this month in our court is to on a monthly basis circulate among all of the judges a list of all of the attorneys who have received assignments and which judges are giving them assignments. I think that by providing public disclosure, whether that is disclosure to the state court administrator's office or to whomever—

**JUSTICE TAYLOR:** Can someone come to the clerk's office and pick that up.

**JUDGE KENNY:** Justice Taylor, I don't know if that's available to the clerk's office but certainly Chief Judge Sapalla has that information.

**JUSTICE TAYLOR:** Well all I'm asking is, is this accessible to those who generally like to report on public matters.

**JUDGE KENNY:** The answer is yes. And I think that would address many of the concerns where the practice of the assigning judges is out in the sunshine for

everyone to –

**JUSTICE TAYLOR:** Can I ask you a question. When we took testimony on this in Flint and Judge Sapalla testified and my memory is somebody else came in and I can't quite remember who, right now,

**JUSTICE YOUNG:** John Mayer.

**JUSTICE TAYLOR:** John Mayer, but I'm not sure this was John Mayer's idea but in all these other large counties, Kent, Macomb, Oakland, they also want to select for the difficult case the well-qualified lawyer but they have a different system of doing it, one that removes the judge from the selection process but has a third party that would be doing the same kind of thing. Has any thought been given for the sake of appearance of propriety, to doing something like that in Wayne County and modeling perhaps after the Genesee County and Macomb County, Oakland County or Kent County circumstances.

**JUDGE KENNY:** Well, we've discussed that and I think the sentiment seems to be pretty strongly against that.

**JUSTICE TAYLOR:** And why is it. The judges in those counties all seem to feel that they have no need to have the appointment authority.

**JUDGE KENNY:** Well I think that first of all the volume in those other counties is not the same as we have. And I think that it is difficult to assess which are the cases that judges really need to–

**JUSTICE TAYLOR:** Well how do they do it. I mean Oakland County gets, as you know, a tremendous number of high profile difficult cases and my understanding is that they think that their system of having a third party that does this, and again I'm sort of fuzzy on this, but there is an individual who had lists and he goes to see Judge Kenny after the trial and you say well you know Lawyer Smith was weak, strong, whatever. He seems to be very good on drug cases but not so good on assault cases, whatever. And this is all sort of compiled in a way that made sense to them. Has your bench–look, there's a real appearance problem here and I think you fellows recognize that. Now my question is, why don't you talk to the people in Oakland County where they have the same concerns you do and they seem to feel they've resolved them in a way that causes people who observe the judicial system to not think there is something funny looking.

**JUDGE KENNY:** Well let me just say this preliminarily, I think that what

caused some change in Oakland County as I recall is that there was some considerable publicity regarding the fact that there were abuses in Oakland County and I don't think we have that.

**JUSTICE YOUNG:** Well that set of changes were prompted by articles in the local paper about assignments made by certain of your colleagues that were hard to understand. Isn't that the case. Actually before you reached the bench.

**JUDGE KENNY:** There were changes that were made with regards to who could receive assignments, yes, that dealt with what appeared to be an appearance.

**JUSTICE YOUNG:** No, not just an appearance. Some people were assigning to their relatives. There were serious concerns that were aired in the local newspapers.

**JUSTICE TAYLOR:** Wouldn't it be helpful for you and your colleagues to be able when faced with this criticism to say look people contribute to me. I don't give them appointments. I don't even have authority to do that. This is done by someone who we have deputized for this function who is beyond my control. I don't understand the resistance to this notion which has proven to more or less immunize the judges in the surrounding large counties from this kind of claim.

**JUDGE KENNY:** Well I think the response to that is the fact that we as the trial judges who see the attorneys day in, day out, feel that we best know—

**JUSTICE TAYLOR:** I understand that argument but it's no different than Oakland County. They see them too and they report into their person who does this kind of evaluation and they seem to feel it works fine and I don't know why you people wouldn't be interested in having that. I mean I really will tell you, I don't think any of you want to preserve this system so you can maximize campaign contributions. I really believe the best. What I can't figure out is given that, why you don't want to take away this thing that could someday be an embarrassment to your bench even though it shouldn't be.

**JUSTICE CORRIGAN:** With all due respect, Judge Kenny, I thought that at our public hearing in Flint that Chief Judge Sapalla indicated a willingness to at least take a look at the systems that were in place in Oakland. I mean that's my recollection. That he had indicated such a willingness to us to explore these possible systems. Is that not the case to your knowledge.

**JUDGE KENNY:** That I don't know.

**JUSTICE TAYLOR:** Well, might it be possible to inquire of him and then perhaps touch base with the Chief Justice and let us know what you're thinking about down there.

**JUDGE KENNY:** Absolutely I will do that, but if I can, let me just make this other comment. In response to what Justice Young raised as well with regards to what appeared in the paper. For those of us who are doing the job correctly and we feel that our ability to select the right attorney for the right factual circumstance, our feeling is that in a sense we, as well as the defendants, are not getting the best circumstance because of the actions of a few. And if that means that perhaps sanctions need to be taken against the few, my feeling is so be it. That if we have 28 out of 30 judges in Wayne County who are handling the matter correctly and two are not, I don't think that the remedy is to go after the 28.

**JUSTICE TAYLOR:** That's well understood. Have you ever talked to your colleagues in Oakland County. I have yet to find one of them who thinks the system they are using, and they have very high profile difficult cases in their criminal system, I'm sure you would agree, seems to feel the system they're using is causing incompetent lawyers to be appointed on high profile cases. Indeed they seem to feel that isn't happening.

**JUSTICE YOUNG:** The federal eastern district has a number of high profile cases. I've never heard one of the article 3 judges over there complain that they are unable to staff the defense of cases with competent lawyers. Let me simply say I understand some of the concerns you've raised but the issue is not limited to criminal assignments. The issue occurs whenever there is a relationship between an assignment for value, namely the attorney receives publicly financed compensation and there is a relationship in turn for the contributions to the appointed authority. That is not limited to those who are assigning cases in criminal divisions. Your probate judges, there are a whole series of appointments beyond criminal assignments.

**JUDGE KENNY:** I am aware of that and—

**JUSTICE YOUNG:** In fact there are others who have far more to give than perhaps some of the judges who serve on the criminal dockets.

**JUDGE KENNY:** I would agree and I guess my response to that would be that I don't think that a one size fits all solution necessarily is appropriate here.

**JUSTICE YOUNG:** Well what would be the criminal division's solution if it becomes a fixed perception that this is something that cannot continue. That judges who appoint cannot have a direct contribution relationship with the attorneys they appoint. What would be the alternative to what you're doing now.

**JUDGE KENNY:** I'm not sure I'm prepared to give an answer to what would be a completely new system. We have prepared and are prepared and have implemented limitations on the numbers of assignments that are given. One of the other differences I think between the probate circumstance and what we have in the criminal court is that we are on assignments once every 14 months. And when we give assignments, since there are 30 of us and cases are handled on a blind draw, there is only a 1 in 30 chance that the case that you assign is going to end up in front of you, so you are, as a statistical matter, are not likely to be dealing with the attorney that you have given the assignment to.

**JUSTICE TAYLOR:** But that's not the real gravem (?) of the problem though, the problem is the mere appointment itself. I don't think there is anybody who is suggesting that to make this a valuable transaction for a lawyer he would have to appear before the judge who he gave the contribution to. He wants the appointment, runs the theory. And I think all we're talking about here, Judge Kenny, is, we're not trying to suggest that there is corruption in your court at all. All we're saying is, why not, while there isn't any, get this situation addressed in a way which makes sense and will accomplish the goals that you want to accomplish, having the right lawyer for the right case, in a way which is totally defensible in terms of the way we finance campaigns in this state. It's a very modest kind of thing. We have no big agenda here. We don't think there's anything wrong in your court. We don't think you guys are doing things that are outrageous.

**JUSTICE YOUNG:** It isn't directed, in fact, at your court.

**JUSTICE TAYLOR:** Yeah. We simply think that it would be good to establish some sort of mechanism that accomplishes the goals you want to accomplish and immunize you from the claim that you're doing something improper.

**JUSTICE YOUNG:** I get the feeling that your colleagues think that this is an issue that is directly uniquely to that division of the court.

**JUDGE KENNY:** I think that's a correct perception.

**JUSTICE YOUNG:** Why would they think that.

**JUDGE KENNY:** Probably because we assign more cases probably than any other court.

**JUSTICE YOUNG:** The value of the assignments that happen in probate are much more valuable to the lawyers.

**JUDGE KENNY:** I would agree. And I guess it returns and I certainly would follow up on Justice Corrigan's comments about talking with Judge Sapalla and to report back on Judge Sapalla's position regarding the Oakland County model.

**JUSTICE TAYLOR:** That would be awfully helpful. There may be some logistical reason, the volume of these things is so high that you couldn't use the system they use in one of these budding counties. We just don't know this. But you folks who are the most knowledgeable about this could probably fairly rapidly, I would think, look this over and say, you might even conclude it's a good idea. You might conclude it won't work here because of A, B and C. But we'd like to know that, I think.

**JUDGE KENNY:** All right. I would be happy.

**JUSTICE WEAVER:** Just submit something in writing to my office.

**JUDGE KENNY:** I will. Okay. Thank you so much.

**JUSTICE WEAVER:** Okay. Is anyone else here for Canon 7. Let me note here that I had a Mr. Falk down but he is not present, I don't think.

**MR. BUSH:** Jerry Bush. I would like to address this issue just a little bit. I think that you pretty well discussed it before but in regards to Judge Taylor said something about incompetent lawyers in high profile cases. Just Tuesday night I think it was there was a public broadcast on TV note on the injustices that have been done on death penalty cases and they had a panel on there and they had the governor of Illinois who has ceased all death penalty cases in that state and one of the things that he said is that the primary problem has been ineffective counsel in these cases. That's why 50% of them have been overturned on appeal. And this of course goes to some of the issues that you've raised and that are concerned about here. I thought of two things that might be alternatives. I would say one thing, too, that in some of the parts of the state that are not as populated as Wayne County, some of the judges might have a real problem assigning anybody to a case if they could not assign somebody within two years of having received a contribution because there are not that many attorneys or judges. But an alternative

which might be better for both civil and criminal, one alternative, the issue seems to go to a conflict of interest or to possible prejudice. And I think a possible alternative would be to divulge in open court on the record contributions made by attorneys or the law firm, or have a published list where the attorney and the contributor are someplace available for the public to view, see and evaluate. And a second alternative might be for a list to be created whereby the defendant could select the attorneys who do these types of things instead of having a judge select that person. And the list of course would have to have some sort of expertise of each attorney and the type of work they do, death penalty cases, I mean, murder cases, or whatever. Thank you.

**JUSTICE WEAVER:** Thank you, Mr. Bush. Anyone else for Canon 7? Okay we've completed our list of items that have been scheduled for comment today, and I have no other parties that have indicated they wish to speak so with that I think we will be adjourned. Thank you.